

# MONTANA LAWYER

State Bar  
— of —  
Montana

March 2018 | Vol. 43, No. 5

## Grants fund good works of legal organizations



### Also in this edition

- > Lawsuit plaintiffs, their lawyers do not fare well in new federal tax overhaul legislation
- > Candidates sought for State Bar elections
- > Supreme Court oral arguments scheduled in Missoula, Bozeman in high-profile cases
- > Fehr selected 13th Judicial District judge

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Publisher | *John Mudd*

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406-447-2200; fax: 442-7763

email: editor@montanabar.org

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# Montana's Constitution: A bold, unique and visionary document



***The Honorable Leslie Halligan is a 4th Judicial District judge. Before her appointment as district judge, she served as a standing master in the 4th Judicial District and as a deputy county attorney in Missoula County.***

In March, I wish to recognize and celebrate the 1972 Constitutional Convention Delegates, the 100 men and women who joined together to craft a bold, unique and modern Montana Constitution, reflective of our Montana values. On June 6, 1972, Montanans voted to adopt the Constitution, which passed narrowly, 116,415 to 113,883 votes; Gov. Forrest H. Anderson officially adopted it on June 20, 1972. What has been described as visionary and magnificent, the 1972 Montana Constitution added 17 rights to those rights provided in the 1889 Montana Constitution, none of which were provided in the United States Constitution. The Montana Declaration of Rights contains 35 sections. The Constitution's remaining provisions focus on the establishment and operation of a just government for Montana. You should take some time to ponder its wisdom and foresightedness, beginning with its Preamble:

"We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution."

Among the significant individual rights adopted by the delegates was The Right to Individual Dignity, which is found only in Montana's Constitution. (At the time, the Equal Rights Amendment had been introduced and passed in Congress but not ratified by the States.) It is the only provision that announces an inviolable right. "The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Art. II, Sec. 4.

Montana is just one of six states that grants to its citizens a specific Right of Privacy in its Constitution. As provided in Art. II, Sec. 10: "The right of individual privacy is essential

to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Delegate and Attorney Bob Campbell, a 50-year member of the State Bar, was instrumental in securing our right of privacy, advocating concern about government intrusion into the lives of citizens. This intrusion, he predicted, would occur through electronic surveillance and eavesdropping. It is a concern that only grows stronger with the sophisticated technology of today.

Also, unique to the Montana Constitution are the right to a clean and healthful environment, Art II, Sec. 3, and The Right to Know & Participate, Art. 11, Sec. 8 and 9. As mentioned in my last article, the Constitution grants to minors all of the fundamental rights granted to adults, unless specifically prohibited by the laws that enhance their protection. Art. II, Sec. 14.

As lawyers advocate for civil rights and seek judicial determinations that interpret and balance individual freedoms with competing interests, our Montana Constitution has shown time and time again its unique ability to meet the needs of individuals and society. Your work as lawyers and advocates breathes life into our Constitution, and continues to enhance the visionary work of our Constitutional delegates.

In my efforts with the State Bar, I am privileged to work with professionals who are advancing the vision of the 100 Constitutional Convention Delegates. I value opportunities to meet lawyers with interests different from my own. Certainly, we all have different styles, personalities and opinions, but the law joins us together as we seek to advocate for issues and for individuals – for justice. In Montana, our history is replete with leaders, individuals from all parts of the state, all occupations, races and ethnicities, who have contributed to the betterment of the state and its people. Recently, I was privileged to meet with leaders of our State Bar sections, working to advance areas of practice or groups with similar interests. Please consider becoming a Section member, to join with other attorneys as we all work to advance and protect the ideals of our Montana Constitution.

As lawyers advocate for civil rights and seek judicial determinations that interpret and balance individual freedoms with competing interests, our Montana Constitution has shown time and time again its unique ability to meet the needs of individuals and society.

## Investing in the bar's future



*John Mudd began as executive director of the State Bar of Montana in January of 2018. He is a long-standing member of the Bar's Professionalism Committee.*

The Montana Supreme Court recently approved the State Bar of Montana's request to increase dues on active and inactive members, a change that is reflected in the dues statement you will be receiving this month. As the executive director of the State Bar of Montana and the chief executive officer and manager of our staff and day-to-day operations, it is my hope that with continued creativity and diligence on our part, this most recent dues increase will sustain the bar well into the future, positioning the organization to continue to engage in the important work of our mission, "to lead the legal profession and serve the public interest."

In my view, that starts with serving each of you and providing value for your dues. In May of this year, the Board of Trustees will engage with our stakeholders in a strategic planning session to chart our course as an organization. As we begin that process, I want each of you to know that your opinions matter and we need your good ideas. As we strive to be a valuable partner in your practice, let us know where you would like to see the bar in the next two to three years. We've established an email address – [feedback@montanabar.org](mailto:feedback@montanabar.org) – to gather your

comments and suggestions.

This month's Montana Lawyer also touches on investments in other areas where we can be particularly proud as Montana attorneys. Last month, the Montana Justice Foundation announced another series of Bank of America Grants totaling \$325,000 in the next two years. As the charitable arm of Montana's legal community, the Montana Justice Foundation is a critical partner in the fulfilling the mission of the State Bar of Montana through its private investments to improve our justice system.

Finally, as always, this month's issue is filled with valuable information for your practice, including appellate practice tips from Michael Manning and an analysis of the effects of the new tax laws on deductions for legal fees from Robert Wood. And our regular contributor Mark Bassingthwaite of ALPS talks conflict of interest traps.

Thank you all for everything all that you do every day to improve our profession and invest in our judicial system. I hope that you enjoy the magazine.



STATE BAR OF MONTANA

**FACEBOOK:** [StateBarOfMontana](#)

**TWITTER:** [@StateBarMT](#)





### Warhank, Biehl announced as shareholders with Church, Harris, Johnson & Williams

The law firm of Church, Harris, Johnson & Williams is pleased to announce that Hanna Warhank and Eric Biehl have become shareholders with the firm.

Warhank grew up in the Hi-Line town of Rudyard. She earned a B.A. degree in accounting and political science from Carroll College before earning her Juris Doctor from the University of Montana School of Law in May of 2009.



Warhank

Warhank joined Church, Harris, Johnson & Williams as an Associate Attorney in 2009, practicing there until 2012. She worked for the Helena law firm of Gough, Shanahan, Johnson & Waterman from 2012 to 2015. In November of 2015, she returned to Church, Harris and has maintained an office in Helena since that time.



Biehl

Warhank is a member of the State Bar of Montana and the American Bar Association. She works mainly from Helena but is available to meet clients in both Helena and Great Falls. She is a member of the firm's tax and transactional practice group and her practice focuses on business and estate planning, taxation, estate and trust administration, and real property.

Biehl is a member of the firm's litigation team and represents clients in disputed and litigated matters both in and out of the courts.

Biehl's practice includes personal injury law and pursuing compensation for injured victims. He also represents individuals and business entities in business, corporate, and contract disputes; estate, trust and probate disputes; construction disputes, and other civil law areas.

Prior to joining Church, Harris in 2014, Biehl worked for Hoines Law Office, providing litigation services and focusing on personal injury law and civil litigation. He is admitted to practice law in California, Montana, North Dakota, and Washington, D.C. He is a member of the American Bar Association, Cascade County Bar Association and the Montana Trial Lawyers Association.

Biehl is a fifth generation Montanan and grew up in Red Lodge and Great Falls. He received a B.A. in film and television production from Montana State University in 2006 and received his law degree from Pepperdine University School of Law in 2010. In his free time he enjoys the Montana outdoors, travel, and coaching wrestling.

Church, Harris, Johnson & Williams, P.C. is a full-service law firm with locations in Great Falls, Helena and White Sulphur Springs. Both Warhank and Biehl can be reached at 406-761-3000. Please visit [chjw.com](http://chjw.com) for more information.

### Moira Murphy opens family law, criminal defense firm

Billings attorney Moira Murphy has opened her own practice specializing in family law and criminal defense.



Murphy

Murphy graduated from the University of Montana School of Law in 1995 and previously worked for the Billings City Attorney's Office and Office of the State Public Defender.

### Holland & Hart adds 2 associates in Billings

Her office is located at 2722 3rd Ave. North, Suite 240, Billings. She can be reached at 406-206-6513 or [moiramurphylaw@gmail.com](mailto:moiramurphylaw@gmail.com).

Vicki Marquis and Hannah Tokerud recently joined Holland & Hart's Billings office as associates. Marquis counsels clients on natural resource and environmental litigation and permitting matters,

specializing in water quality, endangered species, and environmental review. Tokerud is a member of the firm's commercial litigation group and focuses her practice on complex civil litigation and appellate advocacy.

Marquis has worked with legislators, agencies, and industry groups on water quality issues. Clients will benefit from her experience as an environmental enforcement specialist with the



Marquis

Montana Department of Environmental Quality, as a chemist in private industry, and as a coordinator for a local government watershed group. She served for more than 15 years in the United States Army Reserve and National Guard and she currently serves in the Judge Advocate General's Corps. She earned her law degree from University of Montana School of Law, and her bachelor's degree from Gonzaga University. Vicki is admitted to practice in Montana, Wyoming, and North



Tokerud

Dakota.

Tokerud brings extensive experience in civil litigation and appeals in state and federal courts from her clerkship for Chief Judge Sidney R. Thomas of the United States Court of Appeals for the Ninth Circuit. After graduating from law school, she also clerked at the United States District Court for the District of Montana and the Montana Supreme Court. She earned her law degree from the University of Montana School of Law and her bachelor's degree from University of Pennsylvania. She is admitted to practice in Montana and Washington.

Holland & Hart is a full-service law firm that today has approximately 500 lawyers across eight states and in Washington, D.C., delivering integrated legal solutions to regional, national, and international clients of all sizes in

a diverse range of industries. For more information, visit [www.hollandhart.com](http://www.hollandhart.com).

### Hensel opens civil litigation law firm in Billings



Hensel

Craig C. Hensel is pleased to announce the formation of Hensel Law PLLC in Billings. Hensel Law will focus on civil litigation, with an emphasis on plaintiff's personal injury. Hensel Law is located at 1780 Shiloh Road, Suite B1 in Billings.

He can be contacted at [craig@hensel-law.com](mailto:craig@hensel-law.com) or 406-325-7000.

### Turman joins as associate at Cromwell Law in Bozeman



Turman

Cromwell Law, PLLC, in Bozeman is pleased to announce that Layla Turman has joined the firm as an associate.

Turman was born and raised in Gillette, Wyoming. She earned a bachelor's degree in journalism and political science from the University of Montana. She received her law degree from the University of Montana

School of Law and is admitted to practice in Montana.

During law school, Layla served as the clinical attorney for ASMSU Legal Services at Montana State University as well as a Court Appointed Special Advocate in Missoula. Prior to joining Cromwell Law, she interned with the Bozeman City Attorney's office and Western Justice Associates in Bozeman.

Her practice areas include family law, consumer protection, and landlord-tenant law. She can be reached at 406-570-7652 or [layla@cromwellpllc.com](mailto:layla@cromwellpllc.com).

### Melvin joins as associate at Schulte Law Firm

Megan Melvin is Schulte Law Firm's newest associate, joining the firm upon her graduation from the University of



Melvin

Montana School of Law in May 2017. Melvin practices in the areas of criminal defense, personal injury, family law, and environmental law, specializing in water law issues.

She is admitted to practice in all Montana courts and in the United States District Court for the District of Montana.

Melvin grew up in Indiana and on the Gulf Coast of Florida, where she attended Florida Gulf Coast University. After earning undergraduate degrees in English

and philosophy, she moved to Montana and worked as a legal assistant for several years prior to attending law school.

While in law school, she competed on the National Moot Court team, where her team placed third in the region. She also served as vice president of the student chapter of the Montana Trial Lawyers Association. She was awarded the Montana Trial Lawyers Association scholarship in her third year for her demonstrated interest and excellence in trial advocacy. She completed her law school clinic at the Federal Defenders of Montana, where she gained valuable experience in the federal criminal courts.

She may be reached at 406-721-6655 or [megan@jschultelaw.com](mailto:megan@jschultelaw.com).

## HONORS

### Mason named a Georgia Super Lawyer in business litigation

Kirby Mason of HunterMaclean in Savannah, Georgia, has been named a 2018 Georgia Super Lawyer in business litigation. Mason is a member of the State Bars of Georgia, Montana and South Carolina.



Mason

Alexander Blewett III  
SCHOOL OF LAW  
UNIVERSITY OF MONTANA

## Advanced Trial Advocacy Program

May 21 - 25, 2018

*This program is recommended for any lawyer wishing to improve skills with witnesses and courtroom argument whether in trial, deposition or hearing.*

**Tuition:** \$1750 by April 16 | \$1950 after April 16

**CLE:** Approximately 30 credits (pending approval)

**Registration:** [umt.edu/law-ata](http://umt.edu/law-ata)

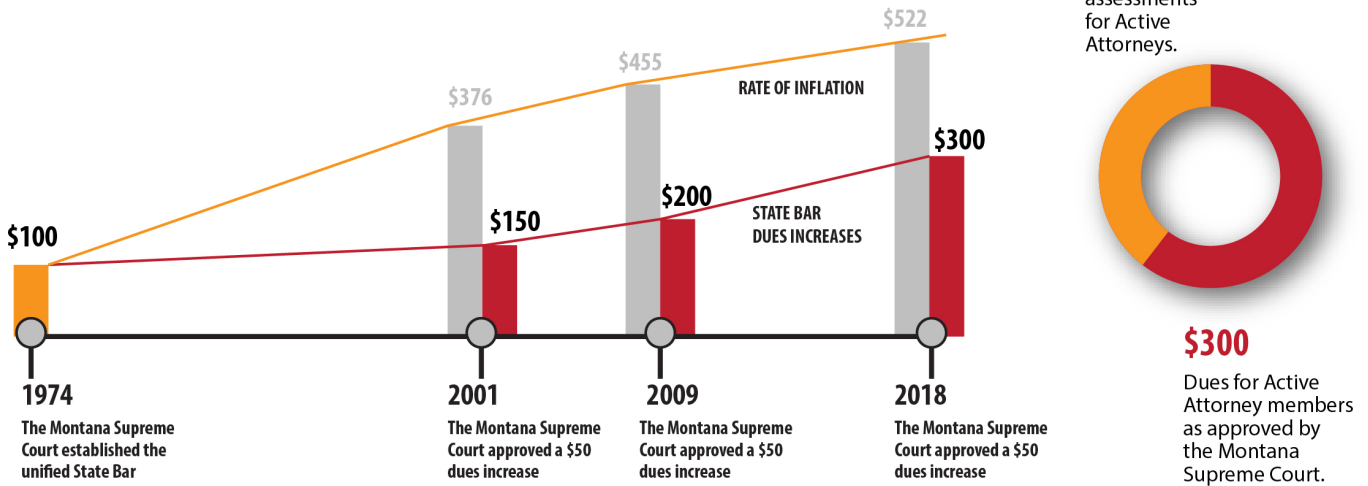


### A Complete Experience

The Advanced Trial Advocacy Program covers all aspects of the trial process from jury selection to closing arguments in both lecture and practice environments.

## DUES, FEES & ASSESSMENTS

The Montana Supreme Court in February approved dues increases for active and inactive attorneys. Dues are now \$300 for active attorneys and \$185 for inactive. The timeline below shows the history of bar dues increases. The chart at right shows the breakdown between dues and fees and assessments for active attorneys.



Montana Lawyer graphic

## Supreme Court approves dues increase for active and inactive attorney members

The Montana Supreme Court has approved the State Bar of Montana's request for a dues increase for active and inactive members.

Under the court's Feb. 20 order, dues for active attorneys will increase from \$200 to \$300, and dues for inactive attorneys will increase from \$125 to \$190. The change takes effect for the 2018-19 fiscal year and is reflected on dues notices that were mailed on March 1.

The court decided not to increase dues on senior members as had been requested in the bar's petition. Justices cited concerns that a dues increase could be a hardship on senior members who no longer have income from practicing law and could discourage some from maintaining their memberships.

Justices voted to approve the increase at a public meeting on Feb. 13. Justices

agreed that the bar had demonstrated in its 2017 Special Report to the Court that a dues increase is necessary for the bar to continue to run its mandated programs and services.

The bar petitioned for the dues increase in September of 2017, at which time the court opened a public comment period. The court received only 10 comments about the proposal, which were split between supporters and opponents, with others objecting to details of the proposal.

The bar publicized the dues request and the court's comment period in the Montana Lawyer, in the Bar Briefs email newsletter, through outreach from Board of Trustees members, on the bar website and on social media.

### Candidates sought for 2018 State Bar elections

The filing deadline for the 2018 State Bar elections is Monday, April 2. Positions on the ballot are president-elect, State Bar delegate to the ABA, and trustees from Areas A, B, C, D and G.

Download nomination petitions and find more information on our elections page at [www.montanabar.org/page/State\\_Bar\\_Elections](http://www.montanabar.org/page/State_Bar_Elections). A nomination petition form is also on page 26 of this issue.

### Reminder: Check CLE status

The current CLE reporting year ends March 31, 2018. Please check your record using the MyMTCLE function at [www.mtcle.org](http://www.mtcle.org). Send attendance information to [cle@montanabar.org](mailto:cle@montanabar.org).



# Nominations sought for pro bono, equal justice awards

It is already time to start thinking about nominating worthy individuals for the access to justice awards presented at the State Bar of Montana's annual meeting.

The Neil Haight Pro Bono Award, named in honor of Neil Haight, executive director of Montana Legal Services Association for more than 30 years, recognizes a person who exemplifies Neil's legacy of providing outstanding legal services to Montanans living in poverty. The nominee is a lawyer, other individual or organization which has provided pro bono services to those in need in

Montana. While the nominee may be a lawyer who has provided direct pro bono legal representation, he or she may also be a court employee, paralegal, psychologist, or social worker who has provided pro bono services in aid of direct pro bono legal representation in Montana.

The Karla M. Gray Equal Justice Award honors a judge from any court who has demonstrated dedication and significant efforts to improving access to the Montana justice system. The award is named for the Honorable Karla Gray, the first woman elected to the Montana Supreme Court and the first chief justice

of the Montana Supreme Court. Gray, who served 18 years on the Montana Supreme Court until she retired in 2008, died in 2017 at age 69.

For more information or to find award nomination forms, please visit [http://www.montanabar.org/?page=Award\\_Nominations](http://www.montanabar.org/?page=Award_Nominations). The nomination deadline for both awards is May 25.

Look for information on the bar's other annual awards in upcoming issues of the Montana Lawyer.

## Reminder: CLE reporting period ends March 31

With the current CLE reporting year ending on March 1, now is a good time for attorneys to check their CLE status.

The Montana Supreme Court Commission of Continuing Legal Education website at [www.mtcle.org](http://www.mtcle.org) provides information on annual CLE requirements, rules, forms, FAQs, and a list of programs approved for CLE credit in Montana. Attorneys and paralegals can track their compliance by accessing individual CLE records online using the MyMTCLE function.

There is a 6-week grace period during which you may earn and report CLE credits without penalty.

## Candidates sought for 2018 State Bar Elections

Want to make a difference in the direction State Bar of Montana? Consider running in the 2018

This year, the State Bar will elect a President-Elect; a State Bar Delegate to the ABA; and Trustees for Area A (Flathead and Lincoln Counties), Area B (Missoula, Mineral, Lake, Ravalli and Sanders Counties), Area C (Silver Bow, Deer Lodge, Beaverhead, Granite, Jefferson, Madison and Powell Counties), Area D (Cascade, Glacier, Pondera,

Teton and Toole Counties), and Area G (Gallatin, Park and Sweetgrass Counties).

A nomination petition form is on page 26 of this issue. You can also download nomination petitions at [www.montanabar.org/page/State\\_Bar\\_Elections](http://www.montanabar.org/page/State_Bar_Elections).

## Bar considering paperless ballots for future elections

The State Bar is considering moving to paperless ballots in future election years, and we want to hear your opinion on the subject. Please visit [www.montanabar.org/surveys/?id=Online\\_Voting%20](http://www.montanabar.org/surveys/?id=Online_Voting%20) to take a quick three-question survey.

## Free CLE in Billings, Missoula will provide tools to help vets with discharge upgrades

Invisible wounds suffered in service can lead to a loss of benefits and services for combat veterans, making it difficult or impossible to find a job and re-enter civilian life.

Attorney representation can help veterans upgrade less-than-honorable discharges impacted by PTSD and other invisible wounds – but many of these veterans' calls for assistance go unanswered.

Two free CLE opportunities offered in March – in Billings on Friday, March 16, and in Missoula on Wednesday, March 21 – will give Montana attorneys the

tools to help. Participating attorneys will receive 4.0 hours of CLE training and materials in exchange for agreeing to assist one veteran with a discharge upgrade.

The State Bar of Montana's Veterans Law Section, the University of Montana's Alexander Blewett III School of Law Veterans Advocacy Clinic and the Montana Supreme Court Statewide Pro Bono Program are partnering to offer the programs.

You can register for one of the programs at <https://www.surveymonkey.com/r/MilitaryupgradeCLE>.

## LAP support group meetings held each month

The Montana Lawyer Assistance Program offers support groups each month in cities across the state.

Meetings are in Missoula the first Wednesday of each month; in Billings the third Thursday of each month; in Great Falls the last Monday of each month; and in Helena the last Wednesday of each month.

Meetings in Kalispell are temporarily suspended.

For more information, contact LAP Coordinator Mike Larson at 406-660-1181.

For more information on the Montana LAP, visit [www.montanabar.org/page/LAP](http://www.montanabar.org/page/LAP).

# Arguments in high-profile cases scheduled for Bozeman and Missoula in April

The Montana Supreme Court will travel to Missoula and Bozeman in April to hear oral arguments in a pair of high-profile cases.

An April 6 argument in Missoula is in a dispute over whether donations made to private religious schools are eligible for a state income tax credit.

Meanwhile, in an argument scheduled for April 18 in Bozeman, a man facing prosecution in a child rape case in Billings from almost 30 years ago is asking for the case to be dismissed on the grounds that the statute of limitations is past.

## ***Espinoza et al. v. Montana Department of Revenue***

The 2015 Montana Legislature authorized credits for donations of up to \$150 to scholarship organizations for private schools.

The Department of Revenue, in adopting rules necessary for the law's implementation, proposed a rule making these tax credits unavailable for donations to schools "owned or controlled in whole or in part by any church, religious sect, or denomination."

A group of private citizens challenged that rule.

The Montana Constitution has provisions prohibiting appropriations "to any private individual, private association, or private corporation not under control of the state," and further prohibit "direct or indirect appropriation from any public fund or monies" for any school "controlled in whole or in part by any church, sect, or denomination."

The 11th Judicial District Court concluded that the DOR did not correctly interpret the Constitution, ruling that while it prohibits appropriations that aid religious schools, it is silent concerning tax credits. The court concluded the Constitution does not prohibit tax credits for donations to scholarship organizations that could ultimately go towards religious schools. The Department of Revenue appealed.

Oral argument in the case is set for Friday, April 6, at 9:30 a.m. at the University of Montana's George Dennison Theater, with an introduction to the oral argument beginning at 9 a.m. The argument is part of the law school's Law Week events. (See ad on page 12 for more Law Week events.)

## ***Tipton v. Montana***

Ronald Dwight Tipton was charged in 2015 for the 1987 rape of an 8-year-old Billings girl. Another man, Jimmy Ray Bromgard, had long ago been convicted of the rape, but he was exonerated by DNA evidence in 2002. In 2014, DNA evidence was found to link Tipton to the crime.

The statute of limitations for sexual intercourse without consent was five years in 1987. The statute was amended in 1989 to five years after the victim turns 18; it was amended again in

2007 to allow prosecution if a suspect is conclusively identified by DNA after the statute of limitations has expired.

In response to Tipton's motion to dismiss the charges against him, the District Court ruled that the legislature intended the 2007 statute to apply retroactively. Tipton argues that retroactive application violates the ex post facto provisions of the Montana and United States Constitutions.

Oral argument is set for Wednesday, April 18, at 10:30 a.m. in the Strand Union Building, Ballroom A, on the campus of Montana State University. An introduction to the oral argument will begin at 10 a.m.

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## LEGAL SERVICES CORPORATION Notice of Availability of Grant Funds for Calendar Year 2019

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The Legal Services Corporation (LSC) announces the availability of grant funds to provide civil legal services to eligible clients during calendar year 2019. The Request for Proposals (RFP), which includes instructions for preparing the grant proposal will be available from <http://www.grants.lsc.gov/grants-grantee-resources> during the week of April 9, 2018. In accordance with LSC's multiyear funding policy, grants are available for only specified service areas. On or around the week of March 12, 2018, LSC will publish the list of service areas for which grants are available and the service area descriptions at <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/basic-field-grant/lsc-service-areas>. Applicants must file a Notice of Intent to Compete (NIC) and the grant proposal through LSC's online application system in order to participate in the grants process. The online application system will be available at [https://lscgrants.lsc.gov/EasyGrants\\_Web\\_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login](https://lscgrants.lsc.gov/EasyGrants_Web_LSC/Implementation/Modules/Login/LoginModuleContent.aspx?Config=LoginModuleConfig&Page=Login) during the week of April 9, 2018.

Please visit <http://www.grants.lsc.gov/grants-grantee-resources> for filing dates, applicant eligibility, submission requirements, and updates regarding the LSC grants process. Please email inquiries pertaining to the LSC grants process to [LSCGrants@lsc.gov](mailto:LSCGrants@lsc.gov).



# Fehr appointed 13th Judicial District judge

Billings attorney Jessica Fehr has been appointed to a 13th Judicial District judge opening. Gov. Steve Bullock announced the appointment on March 5.

Fehr has been a shareholder at the Billings firm Moulton Bellingham since 2015. Prior to that, she worked for seven years at the U.S. Attorney's Office for the District of Montana, three years as an affirmative civil enforcement attorney and four years as a white collar criminal prosecutor.

A swearing-in date had not been set by publication.

"I'm looking forward to jumping back into public service," Fehr told the Billings Gazette. "I've missed that part of being a lawyer."

Fehr is subject to election in November. If elected, she will serve a six-year term.

Fehr is a 2004 graduate of the University of Montana School of Law. She received a Bachelor of Science in political science and government from the University of Montana in 2001.

She is a Billings native and a 1997 graduate of Billings Central Catholic High School.

Fehr was one of four people who applied for the seat that was vacated by the Honorable Ingrid Gustafson when she was appointed to the Montana Supreme Court in December.

Fehr is the second judge appointed in the 13th Judicial District in recent months, joining the Honorable Donald Harris, whom Gov. Bullock appointed in November 2017. Yellowstone County voters will choose another two new judges in November. Those positions were approved by the 2017 Montana Legislature.



Jessica Fehr

## Supreme Court Orders

### DISCIPLINE

#### Kohn suspended indefinitely for no less than 7 months

The Montana Supreme Court has ordered an indefinite suspension of at least seven months for Billings attorney Brian K. Kohn.

The Commission on Practice recommended the suspension on Jan. 12, finding that Kohn failed to act with reasonable diligence and promptness in representing a client, and he failed to take reasonable steps to protect the client's interests. Kohn acknowledged that he owed the client a refund of \$850 in unearned fees.

The commission also found that Kohn failed to comply with Montana Rules for Lawyer Disciplinary Enforcement 30 and 32 concerning obligations arising from a prior disciplinary action against him, and that he failed to respond to the Office of Disciplinary Counsel's request for information in the current case.

The commission found that some of ODC's allegations against Kohn were

not established by clear and convincing evidence.

In addition to the suspension, Kohn was ordered to reimburse his client \$850 plus interest and to pay the costs of the disciplinary proceedings.

#### Foust conditionally reinstated after 7-month suspension

Lucas J. Foust was conditionally reinstated to practice law in Montana on Feb. 20 after having served a seven-month suspension.

The Supreme Court ordered that Foust must provide an annual accounting of his trust account for a period of 10 years. He also must submit a report to the Office of Disciplinary Counsel every 90 days for the first three years verifying compliance with his IOLTA trust account obligations with detailed accounting and billing records.

The Commission on Practice recommended the reinstatement and the conditions after a Jan. 11 hearing, at which several attorneys testified on Foust's behalf and no one testified against him.

### RULE CHANGES

#### Commission on Practice area boundary changes considered

The Montana Supreme Court is considering changing the boundaries of the areas represented by lawyer members of the court's Commission on Practice.

The new areas would reflect the areas from which State Bar of Montana Trustees are currently elected, which the court said has a more even balance of attorneys than the current commission areas.

The commission consists of nine attorney members and five non-attorney members. The commission hears and decides lawyer discipline complaints, and in appropriate cases makes recommendations to the Supreme Court for discipline.

The court ordered a 30-day comment period on the proposal, which runs through March 15. Comments must be submitted in writing to the Office of the Clerk of the Supreme Court.

# MJF grants to fund consumer protection program, rural lawyer incubator, Indian Country legal clinics

Montana Justice Foundation has awarded a total of \$325,000 over a two-year period to fund three programs through its 2018 Bank of America Grants.

The projects include a consumer protection program, an attorney incubator project for recent law school graduates serving low- and moderate-income clients in rural areas, and a series of legal clinics in Indian country.

Montana Justice Foundation's Bank of America Grant Program is funded by a national mortgage-related settlement agreement between Bank of America and the U.S. Department of Justice. The settlement agreement and donation terms require Montana Justice Foundation to distribute these funds to legal aid organizations for the purpose of foreclosure prevention, legal assistance, or community redevelopment legal assistance.

"Montana Justice Foundation is proud to support organizations providing legal aid for community redevelopment and foreclosure prevention, especially in some of Montana's most high-need areas," said Executive Director Niki Zupanic. "We sought to fund creative projects that will have a far-ranging and lasting impact on the communities served, and these programs delivered."

Montana Legal Services Association was an early recipient of grant funding from the first installment of the settlement award. In 2015, with the help of a Montana Justice Foundation Bank



of America Grant, MLSA launched its Consumer Protection Project. This year's grant awards continue that project. MLSA's Consumer Protection Project has helped low-income consumers achieve financial stability by resolving matters involving unlawful garnishment or attachment, credit discrimination, bankruptcy, and Fair Debt Collections Practices Act violations.

"Civil legal assistance for consumer matters keeps rightful income directly in low-income communities – helping to prevent future foreclosures and preparing a foundation for community redevelopment," MLSA Executive Director Alison Paul said of the program's impact.

MJF also awarded a grant to the University of Montana's Alexander Blewett III School of Law. Through its Margery Hunter Brown Indian Law Clinic, the law school will conduct a weeklong service trip for law students to provide pro bono or for-academic-credit work assistance with basic legal questions to residents on the Crow

## Call for grant proposals

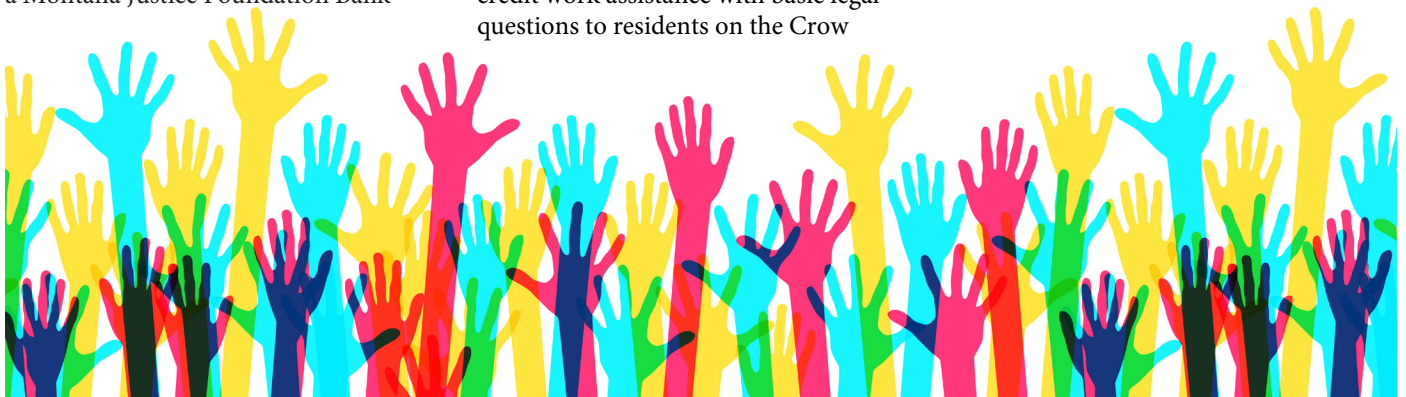
The Montana Justice Foundation is now accepting proposals for its 2018 grants program. The deadline for proposals is April 30. Please see page 13 for details.

and Northern Cheyenne reservations. Students will put their legal education and skills to work in service to tribal members who are often unable to obtain legal assistance.

One of the most promising and exciting proposals MJF received will create a Rural Incubator Project to provide training, support, and mentorship for new attorneys dedicated to providing modest means legal services in rural Montana. This is a collaborative program led and supported by Montana Legal Services Association, the Alexander Blewett III School of Law, the State Bar of Montana, Montana Supreme Court, and the Court's Access to Justice Commission. The Rural Incubator Project is based on several similar programs across the country and tailored to the specific needs of Montanans.

The Rural Incubator Project will

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Payment Detail

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Invoice Number  
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January 2018

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By Michael Manning

# Practical tips for issue preservation



At the beginning of a case, an appeal is the furthest thing from most lawyers' minds. That makes sense—there is never a sure way to predict how a case will develop or whether an appeal will even be necessary. Not to mention, there is plenty of work to do without worrying about a purely hypothetical appeal over completely speculative issues.

That said, it is a mistake not to consider appellate issues early enough in a case. With very few exceptions, any evidence or argument you might want to use on appeal needs to be in the record. Almost every lawyer knows the rule, but you would be surprised how frequently something important gets left out or is not nearly as well-developed as the lawyer thinks. Usually, the problem is subtle. It's relatively rare that lawyers simply ignore good evidence or compelling arguments; it's just not always apparent how a particular trial-level decision made right now might impact an appeal years down the road.

One solution is to consult with an appellate lawyer throughout the case. But that's not to say that every case warrants involving an appellate lawyer. Nor is it to say that a possible appeal should dictate your trial (or pre-trial) strategy. But litigating as if you expect an appeal will often strengthen your case. In fact, it might help you *avoid* an appeal.

Here are a few issue preservation and other appellate-related topics to keep in mind as your case proceeds:

**Deposition Transcripts.** One of the most common preservation issues I've come across involves deposition transcripts. The scenario plays out like this: In a motion, the lawyers on both sides are primarily focused on Argument A. They address Argument B too, but they don't pay much attention to it — it might merit one or two pages in a 20-page brief, for example. But the court seizes on Argument

B and decides the motion on that basis, surprising the parties. Then, on appeal, one of the parties wants to rely on fantastic deposition testimony that supports its position on Argument B only to discover that the testimony never found its way into the record.

This is an extremely easy problem to stumble into during motions practice. Both parties may be constrained by word or page limits, and the non-moving party typically follows the moving party's lead (*i.e.*, a non-moving party won't often spend 10 pages addressing a seemingly throw-away issue that the moving brief covered in a few paragraphs). It's also natural to attach only the portions of a deposition transcript necessary to support the precise points made in the text of the brief. The better practice, however, is to consider what testimony (or other evidence) might be necessary to support Argument B if it suddenly becomes the focal point.

To be sure, there is a balancing act here. Unnecessarily attaching a foot-high stack of exhibits or the entirety of a 500-page deposition transcript is a quick way to irritate the court. So be practical. But keep in mind that good deposition testimony is worthless on appeal if the relevant portions of the transcript never make it into the record.

**Standards of Review.** Worrying about an appellate court's standards of review is probably not exactly on the top of your list as you make strategy decisions in the trial court. But standards of review can have a profound impact in many ways. Here are just a few examples:

■ **Evidentiary issues.** If you receive an adverse ruling on an evidentiary issue, you should never count on it for purposes of appeal. Because evidentiary issues are reviewed for abuse of discretion, no matter how wrong you think the district court got

it — or how often the court was wrong — you are fighting an uphill battle. So don't wait for an appeal to try to deal with the ruling; assume you will lose on appeal and do what you can to minimize its impact immediately.

■ **Jury instructions.** Jury instructions are just the opposite. Although a district court's formulation of the instructions is reviewed for abuse of discretion, appellate courts review *de novo* whether the instructions misstated the law. That means that erroneous jury instructions are often a potential source of appealable error where it might otherwise not exist. For example, if you are faced with the daunting task of trying to reverse a jury verdict, the instructions should probably be the first place you look. The lesson for trial is simple: don't overreach. You are far better off with an instruction that properly states the law but isn't phrased quite as persuasively as you would like than you are with a perfectly worded instruction that arguably confuses the legal standard.

■ **Summary judgment motions.** Everyone who went to law school knows that grants of summary judgment are reviewed *de novo*. But there's more to it than that. The Ninth Circuit is particularly emphatic that it may affirm on any basis supported by the record. Returning to the Argument A and Argument B example, that means that the moving party has a huge incentive to make sure that the record on Argument B is adequately developed, even if it doesn't warrant a lot of space in a brief and the court doesn't address it. If the court incorrectly grants summary judgment based on Argument A, the moving party may still prevail on appeal if there is enough in the record to convince the appellate court that Argument B was correct.

■ **Rule 50 motions.** This is another one that most trial lawyers know well, but

## Appellate, from page 12

it is always worth a refresher. If you plan to make a written motion for judgment as a matter of law under Rule 50(b), it is imperative that you first include *all* the grounds for that motion in a Rule 50(a) motion made before the case is submitted to the jury. If you don't, you will have converted the standard of review for those new grounds from de novo to plain error resulting in a manifest miscarriage of justice. In other words, you will almost certainly lose.

**Deadlines.** Deadlines seem simple enough, but when it comes time for post-trial motions and notices of appeal, there are some nuances you might not be aware of. For instance, you probably know that there is a 28-day deadline for filing Rule 50(b) and Rule 59 motions after entry of judgment. But you may not be aware that the deadlines are claim-processing rules and not jurisdictional. Thus, even though Rule 6(b)(2) provides that a court may not extend the 28-day deadlines, you must object if the opposing party seeks an extension or misses the deadline. Failing to do

so will forfeit (or waive, if you purposefully don't object) any untimeliness argument you might have.

In sum, these are just a small sampling of appellate-type topics to consider at the trial level. They won't apply in every case, and there are many others that are just as important. While it is certainly true that most cases will never end up on appeal, it never hurts to keep issues like this in mind. And if you have a case that seems destined for appeal from the outset, you may be well-served by consulting an appellate attorney long before its time to file the notice of appeal.

\* \* \*

There have been only two published Ninth Circuit opinions so far in 2018 from cases originating in the District of Montana:

### ***Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018)**

**Insurance and Arbitration.** Although an application for a marine insurance policy covering a yacht was not a contract, the policy itself was a contract. And because the policy's arbitration clause

covered both collisions and repairs to the yacht, it concerned a "maritime transaction," meaning that it was subject to the Federal Arbitration Act (FAA). As such, Montana law precluding arbitration of consumer insurance disputes did not apply. Neither the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* nor *M/S Bremen v. Zapata Off-Shore Co. (The Bremen)*, 407 U.S. 1 (1972) changed that result given the existence of an applicable federal maritime law. Applying choice-of-law principles to the policy itself yielded the same result. Accordingly, all the insured's claims were subject to arbitration.

### ***United States v. Hulén*, 879 F.3d 1015 (9th Cir. 2018)**

**Criminal.** A proceeding to revoke supervised release is not a criminal case for purposes of the Fifth Amendment. Rather, it is part of the "matrix of punishment" arising out of the original crime and deprives a probationer only of conditional liberty, which is dependent on observance of special restrictions. The Fifth

Appellate, page 28

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Judge Jeffrey Sutton  
of the United States Court of  
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51 Imperfect Solutions:  
States and the Making of  
American Constitutional Law

5:00 - 6:00 p.m.  
School of Law, Room 101

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## **Montana Justice Foundation Issues Call for Grant Proposals**

The Montana Justice Foundation (MJF) is pleased to announce it is now accepting proposals for its 2018 Grants Program. MJF works to achieve equal access to justice for all Montanans through effective funding and leadership and one way MJF strives to fulfill that mission is through its annual Grants Program.

MJF awards grants to non-profit organizations qualified to carry out the following charitable objectives of the MJF:

- Support and encourage the availability of legal services to vulnerable and underserved populations;
- Increase public understanding of the law and the legal system through education;
- Promote the effective administration of justice; &
- Raise public awareness of and access to alternative dispute resolution.

**MJF accepts applications through our online grant application system. Organizations may create an account and begin the application process at:**

**<https://www.grantinterface.com/montanajustice/common/logon.aspx>**

**The deadline for submission of grant proposals is Monday, April 30, 2018.**

For further information or answers to questions about the application process, please contact MJF at (406) 523-3920, or visit us online at [www.mtjustice.org](http://www.mtjustice.org).

# Tax implications of new law surprisingly bad for lawsuit plaintiffs, their lawyers

By Robert W. Wood

Tax cuts are supposed to be good. Yet as everyone knows, there was both pain and pleasure in the big year-end tax law. For example, there is pain in the \$10,000 cap on deducting state and local taxes. It is roiling high-state tax states, and causing some residents to flee for no-tax states like Texas, Nevada or Florida. Some states are proposing a workaround 'donation' or filing lawsuits to block the law.

A less obvious group adversely impacted by the tax law is plaintiffs in lawsuits. For many plaintiffs in lawsuits, the results of the tax bill are surprisingly bad. By extension, it may impact their lawyers too, impacting case resolution and lawyers' wallets. The biggest hit to many plaintiffs will be the new tax treatment of attorneys' fees.

Many plaintiffs will now be taxed on their gross recoveries, with no deduction for attorney fees. This bears repeating. Many plaintiffs who settle for \$100,000 will be taxed on \$100,000 even if they pay \$40,000 or more to their lawyer. In bigger recoveries, the tax situation can become

dire. This stark reality is going to impact plaintiffs and their lawyers. It may also impact defendants, who conceivably may have to pay more to resolve cases.

## It's all gross income

Part of the tax problem triggered by the sweeping tax bill is historical. In 2005, in *Commissioner v. Banks*,<sup>1</sup> the U.S. Supreme Court held that plaintiffs in contingent fee cases must generally recognize gross income equal to 100 percent of their recoveries. That means plaintiffs must figure a way to *deduct* their 40 percent (or other) fee.

Months before the Supreme Court's *Banks* case, Congress enacted an above-the-line deduction for employment claims and certain whistleblower claims. An above-the-line deduction is almost like not having the income in the first place. An above-the-line deduction subtracts the qualifying fees before you reach page 2 of the tax return.

After the new GOP tax bill, plaintiffs in employment cases are still *mostly* OK, unless their case involves sexual harassment,

a topic considered below. That is, the above-the-line deduction for legal fees remains in the law. This generally ensures that employment claim plaintiffs are taxed on their net recoveries, not their gross.

But there are nagging problems even for employment plaintiffs. For example, a plaintiff's above-the-line deduction for fees in employment and qualifying whistleblower cases cannot exceed the income the plaintiff received from the litigation in the same tax year. As long as all the legal fees are paid in the same tax year as the recovery (such as in a typical contingent fee case), that might not be an issue.

However, what if the plaintiff has been paying legal fees hourly over several years? There are several possible work-arounds, but none is foolproof. Some plaintiffs can end up *unable* to deduct their legal fees even in employment cases.

In addition, only employment (and certain types of whistleblower) claims qualify for the above-the-line deduction. There has always been concern that the IRS could limit deductions for legal fees based on attributing legal fees to particular claims. Will the IRS start allocating

<sup>1</sup> 543 U.S. 426 (2005).



legal fees between employment claims and other claims? That danger seems enhanced now.

Moreover, plaintiffs in employment claims must now contend with the Harvey Weinstein provision for sexual harassment claims and releases. Amazingly, it can disallow all settlement and legal fee deductions, potentially even plaintiffs' deductions. We'll return to this provision after addressing other plaintiffs impacted by the law.

## Impacted Plaintiffs

If you are not an employment plaintiff (or one of a few types of whistleblowers) and your claim did not involve your trade or business, you *may not be able to* deduct legal fees above the line. Until now, that meant deducting your legal fees *below* the line. A below-the-line (or miscellaneous itemized) deduction was more limited, but it was still a deduction.

It faced three limits: (1) only fees in excess of 2 percent of your adjusted gross income could be deducted (so there was a kind of haircut on the first part of your fees); (2) depending on income, you could be subject to a phase-out of deductions; and (3) your legal fees were not deductible for purposes of the alternative minimum tax (AMT).

Now, there is *no* below-the-line deduction for legal fees for tax years 2018 through 2025. If you are not an employment plaintiff or qualified type of whistleblower (and you cannot find a way to position your claim as a trade or business expense, or to capitalize your fees into the tax basis of a damaged asset), you get no deduction. Period. That means you are taxed on 100 percent of your recovery.

Examples of impacted plaintiffs include recoveries:

- from a website for invasion of privacy or defamation;
- from a stock broker or financial adviser for bad investment advice, unless you can capitalize your fees;
- from your ex-spouse for anything related to your divorce or children;
- from a neighbor for trespassing, encroachment, or anything else;
- from the police for wrongful arrest or imprisonment;
- from anyone for intentional infliction of emotional distress;
- from your insurance company for bad faith;

■ from your tax adviser for bad tax advice;

■ from your lawyer for legal malpractice; and

■ from a truck driver who injures you if you recover punitive damages.

The list of lawsuits where this will be a problem is almost endless. Conversely, the list of cases where you should *not* face this double tax is much shorter:

■ Your recovery is 100 percent tax free, for example, in a pure physical injury case with no interest and no punitive damages. If the recovery is fully excludable from your income, you cannot deduct attorney fees, but you do not need to;

■ Your employment recovery qualifies for the above-the-line deduction (but watch out if it involves a sex harassment claim);

■ Your recovery is in a federal False Claims Act case or IRS whistleblower case, qualifying for the above-the-line deduction;

■ Your recovery relates to your trade or business, and you can deduct your legal fees as a business expense; or

■ Your recovery comes via a class action, where the lawyers are paid separately under court order.

Eliminating miscellaneous itemized deductions means that many plaintiffs (outside employment and certain whistleblower cases) will have *no legal fee deduction at all*. Vast numbers of plaintiffs in many types of litigation will feel the full force of paying taxes on their gross recoveries, with no deduction for their fees.

## SEC Whistleblowers

SEC whistleblowers also do not fare well under the new law. An amendment had proposed giving them an *above-the-line* deduction for legal fees. That would match the treatment IRS whistleblowers and Federal False Claims Act whistleblowers enjoy. But the amendment for SEC claimants was *not* included in the final law. That means SEC whistleblowers may pay taxes on their gross recoveries, with *no* deduction for legal fees.

Again, there is *no longer* a below-the-line deduction for legal fees, at least not until 2026. None. The only hope for an SEC whistleblower is to argue that the legal fees relate to employment. Since whistleblowers often face retaliation, that argument should work in some cases.

But the IRS can argue that the SEC award was made in consideration for information and blowing the whistle, not for any retaliation the whistleblower experienced.

If there is a separate employment settlement, the IRS argument becomes stronger. Moreover, the failure of the proposed amendment to add an SEC whistleblower deduction may also affect future IRS examinations. It remains to be seen whether the IRS will trumpet the failed legislative proposal in trying to deny tax deductions to SEC whistleblowers who claim that their fees arose out of employment.

## Sexual Harassment

The new law includes what some call a Harvey Weinstein tax. The idea is to deny tax deductions for settlement payments in sexual harassment or abuse cases, if there is a nondisclosure agreement. Notably, this "no deduction" rule applies to the lawyers' fees, *as well as* the settlement payments.

Of course, most legal settlement agreements have some type of confidentiality or nondisclosure provision. And many employment cases have a mixture of facts and claims, and a settlement agreement that is comprehensive. That means lawyers will worry whether this no-deduction rule will apply.

If it applies, it may apply with a vengeance. Even legal fees paid by the *plaintiff* in a confidential sexual harassment settlement could be covered. The new provision was added into Section 162 of the tax code, which addresses business expenses. Indeed, the Congressional Research Service official summary of the legislation says that the provision "prohibits a tax deduction for trade or business expenses" in certain sexual harassment and sexual abuse cases.

Arguably, Congress' intent was only to limit the defendant's trade or business deduction for settlement payments and related legal fees. Nevertheless, the language actually enacted into the tax code is much broader. It provides that "No deduction shall be allowed *under this chapter*." "This chapter" appears to include every section of the tax code between Section 1 and Section 1400Z-2, covering most that a taxpayer uses for calculating taxes each year.

It therefore could also disallow the above-the-line deduction for a *plaintiff's*



employment and qualifying whistleblower claims. Small allocations to sexual harassment in settlement agreements might be one answer, to preserve the availability of deductions for the *other* claims. However, it is not clear if the IRS will respect them.

## What to Do Now

For many types of cases involving significant recoveries and significant attorney fees, the lack of deductions for attorney fees may seem downright confiscatory. Plaintiffs and their lawyers are unlikely to take the situation lying down. Here are potential ideas for addressing the new rules.

**Separately Paid Lawyer Fees.** Some defendants will agree to pay lawyer and client separately. Do two checks obviate the income to plaintiff? According to *Banks*, not hardly. The Form 1099 regulations may not help. They generally require defendants to issue a Form 1099 to the plaintiff for the full amount of a settlement, even if part of the money is paid to the plaintiff's lawyer. However, some taxpayers may still claim reporting positions on these facts.

**Business Expenses.** One possible way of deducting legal fees could be a business expense deduction. Businesses did well in the tax bill, and business expense deductions remain unaffected (other than the Weinstein provision). But are your activities sufficient that you are really in *business*, and is the lawsuit really related to that business?

Alternatively, could your lawsuit *itself* be viewed as a business? It will probably not look very convincing for a plaintiff's first Schedule C to be filed as the proprietor for a lawsuit recovery. Before the above-the-line deduction for employment claims was enacted in 2004, some plaintiffs argued that their lawsuits amounted to business ventures, so they could deduct legal fees.

Plaintiffs usually lost these tax cases. After all, just suing your employer doesn't seem like a business. It might be regarded as investment or income producing activity (which used to give rise to a below-the-line deduction), but not a business. And remember, after tax reform, investment expenses — whether legal fees or otherwise — do not qualify for a tax deduction.

However, a plaintiff doing business as a proprietor and regularly filing Schedule

C might claim a deduction there for legal fees related to the trade or business.<sup>2</sup> It seems inevitable that we should expect more arguments based on Schedule C from plaintiffs in the future.

**Capital Gain Recoveries.** One other possibility for legal fee deductions might be capital recoveries. If your recovery is capital gain, you arguably can capitalize your legal fees and offset them. You might regard the legal fees as capitalized, or as a selling expense to produce the income. But at least you should not have to pay tax on your attorney fees. Perversely, the new 'no deduction' rule for attorney fees may encourage some plaintiffs to claim that their recoveries are capital gain, just to 'deduct' their attorney fees!

## Exceptions to Banks

There will also be new efforts to explore the exceptions to the Supreme Court's 2005 holding in *Banks*. The Supreme Court laid down the *general* rule that plaintiffs have gross income on contingent legal fees. But general rules have exceptions, and the court alluded to situations in which this general 100 percent gross income rule might not apply.

**Injunctive relief.** Legal fees for injunctive relief may not be income to the client. The bounds of this exception are not clear, but it may offer a way out on some facts. If there is a big damage award with small injunctive relief, will that take *all* the lawyer's fees from the client's tax return? That seems unlikely.

**Court-awarded fees.** Court-awarded fees may also provide relief, depending on how the award is made, and the nature of the fee agreement. Suppose that a lawyer and client sign a 40 percent contingent fee agreement. It provides that the lawyer is also entitled to any court-awarded fees. A verdict for plaintiff yields \$500,000, split 60/40. Client has \$500,000 in income, and cannot deduct the \$200,000 paid to his lawyer.

However, if the court separately awards another \$300,000 to lawyer alone, that should not have to go on the plaintiff's tax return. What if the court sets aside the fee agreement, and separately awards *all* fees to the lawyer? Does such a court order mean the IRS should not be able to tax the plaintiff on the fees? It is

not clear, but the IRS has an incentive to scrutinize such attempts.

**Statutory attorney fees.** Statutory fees are another potential battleground. If a statute provides for attorney fees, can this be income to the lawyer only, bypassing the client? Perhaps in some cases, although contingent fee agreements may have to be customized in unique ways. The relationship between lawyer and client is that of principal and agent. It may take considerable effort to distance a plaintiff from the fees 'his' lawyer is due.

**Lawyer-client partnerships.** How about a partnership of lawyer and client? Partnerships fared very well in the tax reform bill. Moreover, the tax theory of a lawyer-client joint venture (which is just another name for a partnership) was around long before the Supreme Court decided the *Banks* case in 2005. Despite numerous amicus briefs, the Supreme Court expressly declined to address it.

If a fee agreement says it is a 60/40 partnership, can't that partnership report 60/40? The lawyer contributes legal acumen and services. The client contributes the legal claims. Lawyer purists will note the ethical rules that suggest this cannot be a true partnership, because lawyers are generally not supposed to be partners with their clients.

Yet, tax law is unique, and sometimes is at odds with other areas of law. Could not a lawyer-client partnership agreement state that it is a partnership to the maximum extent permitted by law? At the least, it is not clear that ethics rules will control the tax treatment of the arrangement.

To be sure, one factor in how such partnerships will fare with the IRS will be optics and consistency. Partnership nomenclature and formalities will matter. A partnership tax return with K-1s to lawyer and client might be hard for the IRS to ignore. At the very least, lawyer-client partnerships deserve to be resuscitated. There are surely some in the works at this very minute.

## Conclusion

For many types of cases involving significant recoveries and significant attorney fees, the lack of tax deductions for legal fees may be catastrophic. We should

<sup>2</sup> See *Alexander v. Comm'r*, 72 F. 3d. 938 (1st Cir. 1995).



## Would you like to boost your income while serving low- and moderate-income Montanans?

**We invite you to participate in the Modest Means program** {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

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## Questions?

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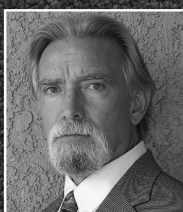
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By Mark Bassingthwaite

# Watch out for common conflict traps



I've spent years trying to encourage solo and small firm lawyers to develop and consistently use a formal conflict checking system that conforms to best practices. I will admit that I have had limited success in this endeavor. This doesn't mean I won't keep trying; but it does mean I've got to accept the reality of the situation. Truth be told, conflict missteps in the solo and small firm arena are not typically a "whoops, we missed that name" kind of thing. More often than not the attorney simply failed to recognize that a conflict was in play, or if she did see it, decided that the issue wasn't significant enough to worry about. So instead of trying to convince you to expand your conflict database and run every name under the sun through it, I thought I'd share a few general tips that can help you avoid many of the more common conflict missteps.

■ Generally, do not represent two or more parties at once such as a divorcing couple, a husband and wife wanting wills, multiple plaintiffs in a personal injury matter, multiple partners forming a new business, or the buyer and seller in a real estate transaction. I'm not saying you can never take on multiple parties. There are situations where it is ethically permissible and entirely appropriate. However I would advise that if you do, fully

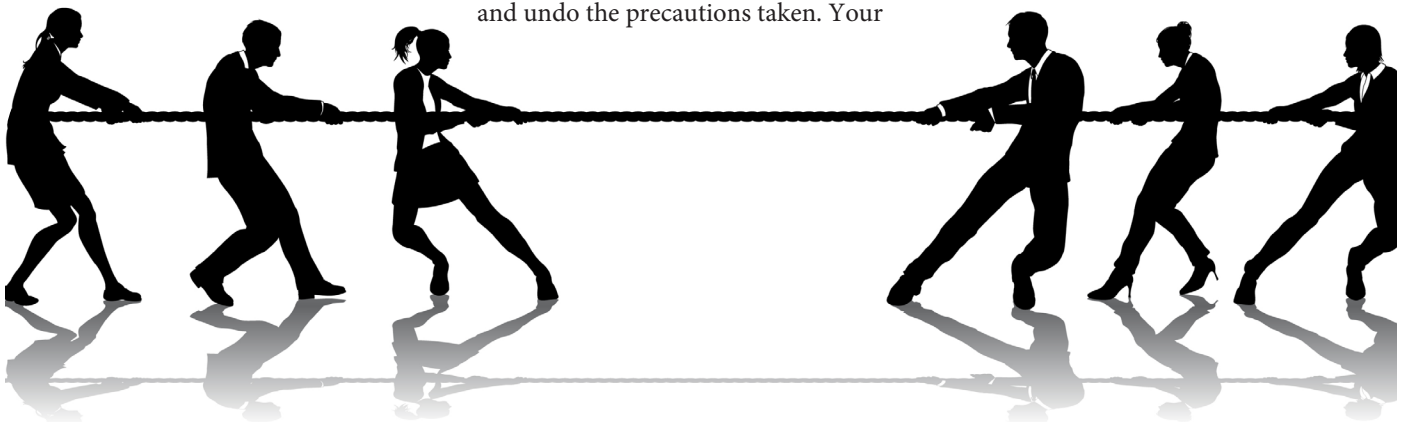
disclose to each of the multiple clients the ramifications of agreeing to joint representation. Discuss how both potential and any actual conflicts will affect your representation of everyone. Advise the clients that on matters concerning the joint representation there is no individual client confidentiality among the group. In addition, consider advising each of them to seek independent outside advice as to whether they should agree to joint representation. Do not proceed with the representation until all clients have given you their informed consent, which should be in writing.

Now, two quick side notes are in order. First, I can share that non-waivable conflicts do exist, in spite of what some of our peers choose to believe, and they often appear in these types of settings. When in doubt, seek advice from someone well versed in our ethical rules. Second, in an attempt to avoid dual representation problems some attorneys will agree to represent one of the parties and document that the other has been advised to seek independent counsel. Should the remaining non-client decide to proceed without representation, understand that you don't get it both ways. In spite of any documentation to the contrary, if you continue to interact with this individual by answering questions to help move the matter along you can unintentionally establish an attorney-client relationship and undo the precautions taken. Your

actions will always speak louder than your written words. Never answer any legal questions from the non-client. Simply advise them to seek independent counsel, and if that slows things down, so be it.

■ Avoid joint representation in those potential conflict situations where there is a high probability that potential conflicts will evolve into actual conflicts such as with criminal co-defendants or with certain situations involving multiple plaintiffs. Remember Murphy's Law. More often than not the actual conflict will arise. If it does and is one that cannot be waived, your only option will be to completely withdraw from the entire matter. Stated another way, in most multiple-client representation matters if you're conflicted out for one client, you're conflicted out for all. This is just one of the risks that come with joint representation. In the world of ethics and malpractice, we call an attempt to stay in with one client while dropping another the "Hot Potato Drop." Should a claim ever arise as a result of your dropping all but one as a client, the lawyers on the other side will put this spin on your actions. They'll argue that you put your financial interests above the interests of the client or clients you dropped and that rarely turns out well for the lawyer being sued.

■ Always document the conclusion of



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# Our conflict rules don't speak of bright lines or the passage of time as being determinative. Keep it simple.

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representation with a letter of closure. In terms of conflicts, an interesting question that arises from time to time is at what point a current client becomes a past client for conflict resolution purposes? The temptation is to rationalize that the passage of time coupled with a bright line gets you there. After all, doesn't the fact that the deed was delivered four months ago, the settlement proceeds were disbursed two years ago, the judge signed the final order last year, or the contract was signed over five years ago mean these various matters are concluded and all of these clients are now past clients?

Our conflict rules don't speak of bright lines or the passage of time as being determinative. Keep it simple. For conflict resolution purposes, once someone becomes a current client, they are always a current client unless and until you clearly document otherwise. So, for example, one would be well advised to never alter a will for one party after having done wills for both parties a year or so earlier absent clear documentation that the prior representation of both had ceased. I would also caution you to keep this in mind if you ever get to the point where you're considering suing a client for fees. You can't sue current clients, so make sure documentation that the client is a past client exists. Again, this is typically done in a closure letter that plainly states something along the lines of "this concludes our representation of you in this matter." In fact, this is the reason why conflict-savvy firms keep all letters of closure even after destroying the related file years after closing it. The closure letter is part of the conflict database because it documents who is a current client and who is a past client.

■ Avoid becoming a director, officer or shareholder of a corporation while also acting as the corporation's lawyer. This dual role can create all kinds of problems to include loss of attorney-client privilege, an increased risk of a malpractice claim, and an inability to participate in certain decisions. If you do find yourself

on a client's corporate board, do not further compound the conflict issues by taking an ownership interest in the company that exceeds 5 percent. At that point the potential conflict problems reach a point where malpractice carriers will often decide to exclude the risk. The safest play is to never take a financial interest in a client entity due to the difficulty in proving down the road that you never put your financial interests above the interests of your client.

■ Periodically stop and remind yourself just who the client is and act accordingly because sometimes it can get messy. For example, an attorney was approached by the son of two long-term clients. Son introduced several non-clients to the attorney and asked the attorney to incorporate a startup business and handle related matters for a small stake in this new company. The son's contribution was to be his intellectual capital and the non-clients were the money guys. The attorney accepted the work and had frequent contact with the son and the investors throughout the process. Sometime later, one of the investors contacted the attorney and asked him to remove a pre-emptive rights clause from the organizing documents in order to facilitate a needed cash infusion from two additional investors who would only make a contribution if they were granted a substantial stake in the company. There were no funds available to pay the attorney for this additional work but he was offered the opportunity to increase his own stake in the company. This request forced the attorney to determine who his client was. At that point he realized that his failure to clarify and document who was a client and who wasn't, coupled with past actions that seemed to allow corporate constituents and investors to believe that he represented everyone, resulted in his correctly deciding that he had no other option but to withdraw.

■ Never solicit investors on behalf of a client's business. If and when that business goes south, you will be the one

targeted for the recovery of all losses. And guess what: Malpractice policies do not cover investment advice. This one will be on you.

■ Be extremely cautious about entering into business relationships with clients. At the outset, Rule 1.8 is clear. The transaction must be fair and reasonable to the client. The client must be made fully aware of and clearly understand the terms of the transaction, the material risks and disadvantages to the client, any reasonable alternatives, the attorney's part in the transaction, and any potential conflicts of interest. The client must not only be advised to seek independent legal advice but actually given a reasonable amount of time to do so. Finally, the client must provide written consent.

The problem here is that the attorney needs to be particularly mindful that he cannot continue employment if his independent professional judgment will be affected by the business interest taken. Additionally, the full disclosure requirements of the rule brings about an obligation to disclose the fact that at some point the attorney and the client may potentially have differing interests in this business transaction that would preclude the attorney from continued service. Further, while the client should be encouraged to seek independent legal counsel, many times the reason that the issue comes up is that the client has no money to pay for legal services and the business deal being considered is an offer of stock in exchange for legal services. At a minimum, the client should be counseled to seek independent advice from another source, perhaps their CPA or financial adviser.

One real risk with these deals is that the business really does prosper or terribly falters. In either case the attorney can be in a difficult position. It's either that he has been substantially overpaid from the client's perspective or is now facing the reality that no payday is coming. While there are no specific boundaries as

**Conflict**, page 28



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# Bench-Bar CLE, Environmental Law CLE, Indian Wills CLE planned for April

The State Bar of Montana has a full slate of topical and informative CLE seminars planned for April.

## Trends in Environmental Law

On Friday, April 13, the bar's Environmental Law Section will present the 2018 in Trends in Environmental Law CLE. The seminar will be in the Radisson Colonial Hotel in Helena and is approved for 6.25 live CLE credits, including 1.25 ethics.

Participants will learn from a faculty that includes representatives from the U.S. Department of the Interior, the U.S. Justice Department's Environment and Natural Resources Division, the Montana Governor's Office, the state Department of Natural Resources and Conservation,

the state Department of Environmental Quality, professors from the Alexander Blewett III School of Law, and leading private environmental law practitioners.

Topics include updates in environmental case law, a review of the Montana Environmental Policy Act, ethical considerations for environmental practitioners, and a look at federal civil and criminal priorities under a new administration.

## Indian Wills CLE

Learn about the federal law and process for disposition of Indian trust assets at the Indian Wills CLE in Missoula Wednesday, April 18.

A live webcast of this CLE will be available, and will count for live CLE credit. Please email [mgallagher@montanabar.org](mailto:mgallagher@montanabar.org)

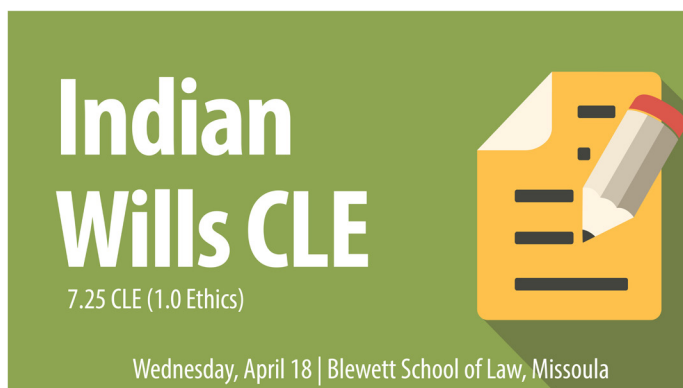
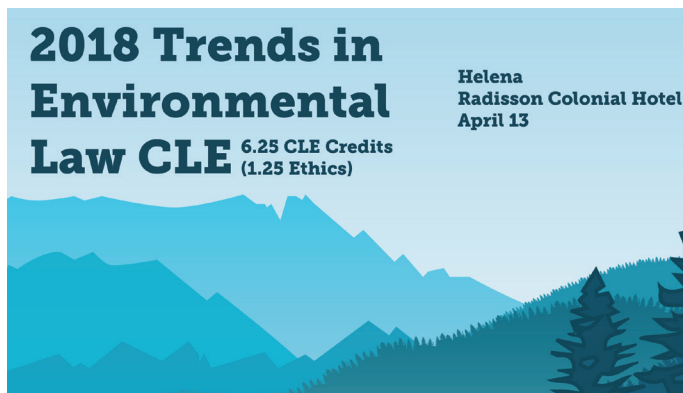
for information on how to register.

## Bench Bar CLE

The popular Bench Bar CLE, approved for 7.5 CLE credits, 1.5 ethics, will be on Friday, April 27, at the Holiday Inn in Downtown Missoula.

The faculty includes two current and Montana Supreme Court Justices Beth Baker, Ingrid Gustafson, Patricia Cotter (retired) and Mike Wheat (retired); Chief Judge Dana Christensen of the U.S. District Court, District of Montana; five current or retired state district court judges; and three current or retired U.S. magistrate judges.

**More CLE on next page**





## Webinars, other notable CLE on schedule for March

■ Wednesday, March 7 -- Webinar: Mediation/Arbitration as a Full-Time Profession, presented by Jay Hunston. 1 live CLE credit.

■ Friday, March 16, Butte St. Paddy's Day CLE, 6.5 CLE credits (3.0 ethics). This seminar will explore two themes. In the morning, participants will learn how to protect their clients and from cyber threats, while the afternoon session focuses on the basics of Montana's alcoholic beverage and gambling licensing and regulatory systems.

■ Friday, March 16, Billings: Veterans Discharge Upgrade free CLE. See page 8 for details.

■ Wednesday, March 21-- Webinar: Mind Body Connection: Ethical Considerations for its use in Mediation. Presented by Dr. Jamison Starbuck, who is a naturopathic family physician and an attorney. 1 live CLE credit.

■ Wednesday, March 21-- MLSA Webinar: Ethical Issues in Pro Bono Representation. Register for free: [goo.gl/iwBv5K](http://goo.gl/iwBv5K)

■ Wednesday, March 21, Missoula Veterans Discharge Upgrade free CLE. See page 8 for details.

■ Thursday, March 22 -- Webinar: 2017 Legislative Changes: Medicaid Provider Audits & Active Supervision of Licensing Boards

### Grants, from page 11

cultivate the next generation of rural legal practitioners to serve low-income and rural Montanans by training and supporting recent law school graduates in building their own sustainable solo and small practices dedicated to serving rural and under-served populations. The Rural Incubator Project will be a force multiplier throughout rural Montana communities by increasing the legal services available to low- and moderate-income Montanans in rural areas and encouraging sliding-scale services and limited-scope representation.

Montana Justice Foundation is proud to be among the first funders to support the Rural Incubator Project and is confident other funders will join in helping to launch this innovative program.

Montana Justice Foundation is a nonprofit charitable organization working to achieve equal access to justice through effective grant funding, promoting pro bono services, and developing more resources for low-income Montanans in need of legal assistance. Access to high-quality legal aid helps secure the overall health, well-being, and security of all Montanans. Attorneys interested in contributing or directing a *cy pres* award to Montana Justice Foundation may learn more at [mtjustice.org](http://mtjustice.org).

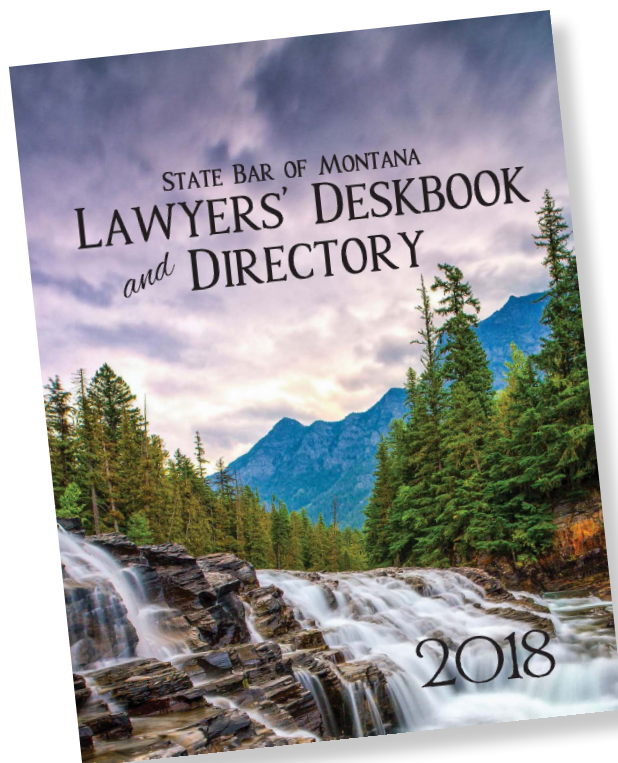
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# 2018 Nomination Petition

## State Bar Officer, ABA Delegate and Trustee Election

I, \_\_\_\_\_, residing at \_\_\_\_\_,  
am a candidate for the office of ( ) President-Elect; ( ) Area A Trustee; ( ) Area B Trustee; ( ) Area C Trustee; ( ) Area D Trustee; ( ) Area G Trustee; ( ) State Bar of Montana ABA Delegate to be held on June 1, 2018. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the State Bar of Montana ABA Delegate and of the Trustee is two years.

Signature \_\_\_\_\_

The following are signatures of active members of the State Bar of Montana supporting my candidacy. Trustee candidates include the area of residence. No fewer than 10 signatures must be provided for a Trustee; and no fewer than 25 signatures for President-Elect or State Bar of Montana ABA Delegate.

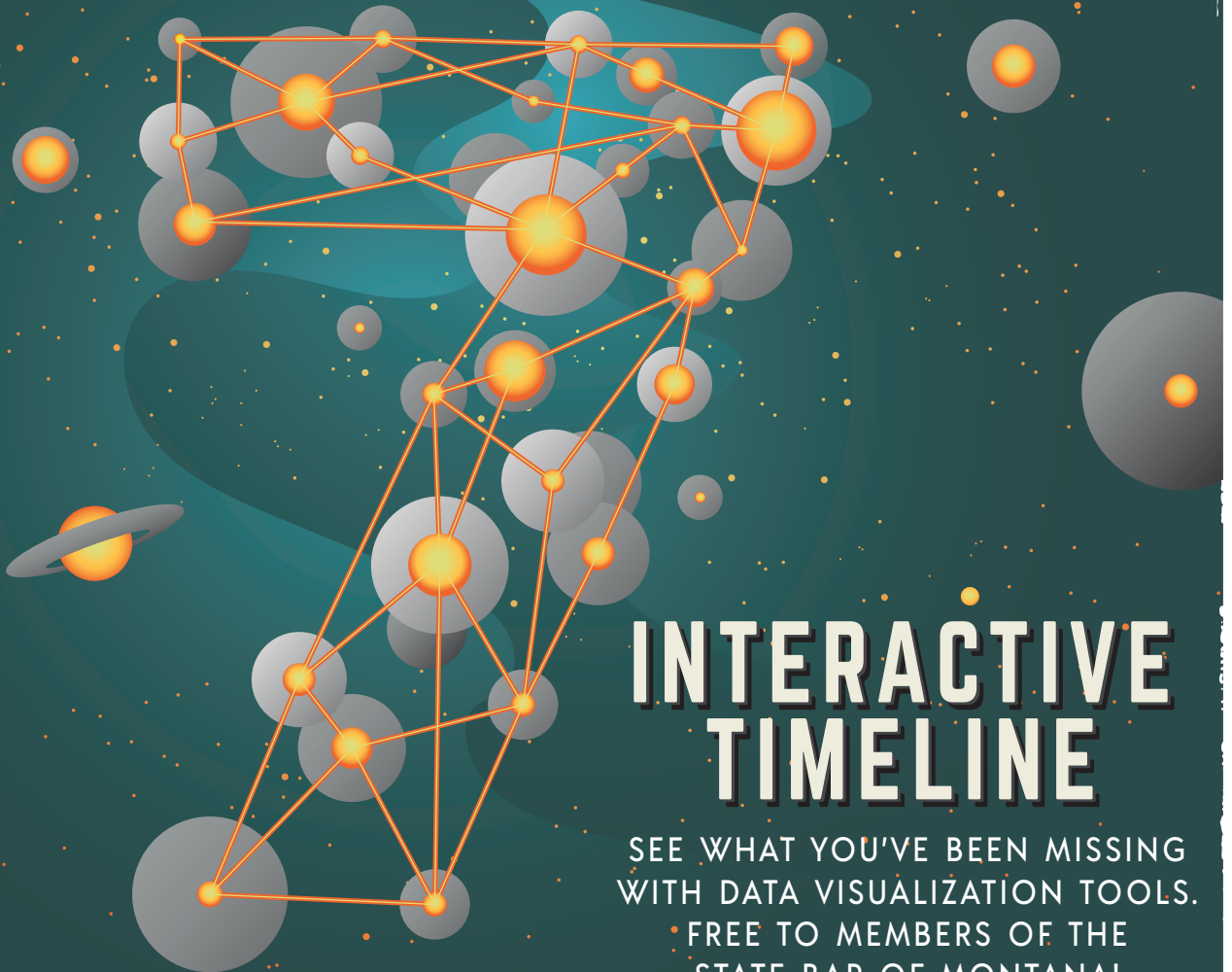
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**Return this petition to State Bar of Montana, P.O. Box 577, Helena MT 59624, postmarked no later than April 2, 2018.**  
*Ballots will be mailed to Bar members on May 1, 2018, and must be returned to the Bar by May 21, 2018.*

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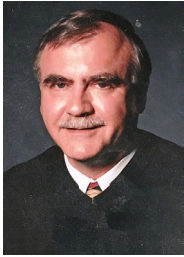




## Simonton, longtime 7th Judicial District judge, dies at 73

The Honorable Richard “Dick” Simonton died on Dec. 26, 2017, at age 73 at his home in Glendive.

Judge Simonton formally retired in July 2017 after nearly 20 years as 7th Judicial District judge, but he continued working until November 2017 to finish his cases.



Simonton

A North Dakota native, he was born on July 7, 1944. Early on in life, he had decided to spend his life as a priest, and he received his high school education at Assumption Abbey, graduating in 1962. After receiving a Bachelor’s of Science from North Dakota State University, he enlisted in the Peace Corps and spent the next two years in Ghana. Upon his return to the United States, he applied to the University of Montana School of Law on a whim while he

was in Missoula and was accepted on the spot. Following his graduation, he moved to Glendive and started working for McDonough and Cox law offices where he later became a partner. He also served as the Dawson County Attorney for several years and had his own law practice before being appointed the District 7 Judge in Dawson County. During this time he also worked on several cases with the Montana Supreme Court.

Judge Simonton enjoyed working, dedicating his time to practicing law and serving the people of eastern Montana. He was an avid baseball fan, always cheering for the New York Yankees. Some of his fondest memories were traveling with family and friends to Whidbey Island in Washington state and the summer vacations that they took as a family, which included several judicial conferences (some of their favorites).

Remembrances and condolences may be shared with the family at: [www.silhafuneralhomes.com](http://www.silhafuneralhomes.com).

### Conflict, from page 24

to how much of an ownership interest is too much, certainly the degree to which an attorney can maintain independent legal judgment would seem to be directly correlated to the percentage of ownership interest owned. As a guideline I would recommend that the ownership interest obtained never exceed 5 percent, as the conflict concerns become too high at that point and beyond.

■ Last but not least, remember that memory doesn’t cut it and conflict checking systems are only as good as the people who use them. Always keep the system current and use it consistently or it will be ineffective. Check and update your conflict database every time you consider taking on a new matter, regardless of whether the matter was accepted or declined. Circulate new client/matter memos throughout the

firm. Make sure the memo affirmatively documents that all attorneys and staff have reviewed the memo to include thinking about personal and business interest conflicts they may individually bring to the table. Finally, don’t forget to look for potential conflicts that might exist if the firm has gone through a recent merger with another firm or had any new lateral or staff hires. (I know, I just couldn’t stop myself.)

**ALPS Risk Manager Mark Basingthwaite, Esq., has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out some of his recent seminars to assist you with your solo practice by visiting our on-demand CLE library at [montana.inreachce.com](http://montana.inreachce.com). Mark can be contacted at: [mbass@alpsnet.com](mailto:mbass@alpsnet.com).**

### Appellate, from page 14

Amendment affords a probationer no right to avoid the consequences of violating those special restrictions. Thus, the district court did not violate the defendant’s right against self-incrimination by

relying on admissions he made during mandatory sex-offender treatment to revoke his supervised release.

**Michael Manning is a partner at Ritchie Manning LLP. A former law clerk for Ninth Circuit Judges N. Randy Smith and Thomas G. Nelson, his practice focuses on appellate advocacy and complex litigation.**

### Tax, from page 16

expect plaintiffs to more aggressively try to avoid receiving gross income on their legal fees in the first place. For plaintiffs who are stuck with the gross income, we should expect some to go to new lengths to try to deduct or offset the fees somehow.

Some of these efforts may be sophisticated and well thought out. Others may be clumsy, if not downright desperate. But few plaintiffs receiving a \$100,000 recovery will think it is fair to pay taxes on the full amount if legal fees have consumed a third or more of their recovery.

Multiply the figures into bigger numbers, and the situation will be worse. Add a higher contingent fee percentage and high case costs, and again, the situation will be worse. Contingent fee lawyers can be expected to be sympathetic, and to try to help plaintiffs where they can. All in all, settlement time for legal disputes looks likely to get more stressful in this troubling new tax world. Tax time will be too.

**Robert W. Wood is a tax lawyer with [www.WoodLLP.com](http://www.WoodLLP.com), and the author of numerous tax books including “Taxation of Damage Awards & Settlement Payments” ([www.TaxInstitute.com](http://www.TaxInstitute.com)). This discussion is not intended as legal advice.**



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**CONSTRUCTION EXPERT:** Over 25 years residential and commercial construction experience. Expert services include bid or project document and plan reviews, onsite inspections for code and/or specification compliance or deficiencies, written reports, consultations, and in-person testimony. Work history includes extensive construction and legal experience - large firm construction management, small firm business ownership, and legal firm paralegal work and practice administration. For CV, fee schedule, references or other information call 406-855-1823 or email [406.cbms.llc@gmail.com](mailto:406.cbms.llc@gmail.com).

**FORENSIC DOCUMENT EXAMINER:** Trained by the U.S. Secret Service and U.S. Postal Inspection Crime Lab. Retired from the Eugene, Ore., P.D. Qualified in state and federal courts. Certified by the American Board of forensic Document Examiners. Full-service laboratory for handwriting, ink and paper comparisons. Contact Jim Green, Eugene, Ore.; 888-485-0832. Website at [www.documentexaminer.info](http://www.documentexaminer.info).

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**SECURITY EXPERT WITNESS:** Board Certified Protection Professional and former Senior Police Commander providing forensic consulting to both plaintiff and defense counsel in all areas/venues of security negligence. A comprehensive CV, impeccable reputation and both criminal and civil experience equate to expert litigation support. Michael S. D'Angelo, CPP. Secure Direction Consulting, LLC. [www.securedirection.net](http://www.securedirection.net). (786) 444-1109. [expert@securedirection.net](mailto:expert@securedirection.net)

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